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No. 06-808

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN DOE, On Behalf of Himself and
All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Remarkably, the Government's Opposition does not deny that the Department of Justice ("DOJ") knowingly engaged in a decades-long pattern of deception and misconduct, sanctioned by DOJ's top officials, that effectively eviscerated its attorneys' statutory right to overtime pay under the Federal Employees Pay Act, 5 U.S.C. § 5542(a) (2000) ("FEPA"). The Government does not dispute that, as the Court of Federal Claims found, DOJ attorneys were officially required to work substantial amounts of overtime, *Doe v. United States*, 54 Fed. Cl. 404, 405 (2002) (*Doe I*), but DOJ officials were directed never to approve even a single hour of that work in writing, *see id.* at 414, 416. Nor does the Government contest that DOJ's top officers repeatedly misled its attorneys by issuing official statements declaring that attorneys were not entitled to compensation for the hundreds of extra hours they were required to work each year. *See* Pet. 9–10.[1]

Instead, the Government contends that this case is not important enough to warrant this Court's time because DOJ was *entitled* to evade its statutory obligations by refusing to "officially" authorize overtime pay in writing and that, in any event, this case has no effect beyond DOJ. To the contrary, the Federal Circuit's interpretation of the federal statute governing overtime pay for all federal employees has continuing government-wide impact and warrants review by this Court, and the confusion and conflicting positions of the circuit courts of appeals concerning equitable estoppel of the Government demand resolution.[2]

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[1] "Pet." refers to the Petition for Writ of Certiorari. "Opp'n" refers to the Brief for the United States in Opposition. Citations to "A." refer to the appendix to the Petition for Writ of Certiorari.

[2] The Government contends that the Petition for Certiorari "does not challenge" the Federal Circuit's ruling dismissing their claims for administratively uncontrollable overtime ("AUO") and holiday pay. Opp'n at 9 n.2. In fact, the Petition included Petitioners' claims for holiday pay, *see*

I. The Writ Should Be Granted Because the Interpretation of FEPA Is of Continuing Government-Wide Significance.

The Government contends that this Court should deny *certiorari* because this case is of no prospective significance. It stresses that this case is of no future importance to DOJ because, after the Government's numerous failed attempts to amend FEPA to exempt DOJ attorneys, it managed to include an appropriations rider in the 2000 omnibus appropriations bill purporting permanently to bar the use of funds to pay DOJ attorneys overtime.[3] Opp'n at 10.

It is far from settled whether the language used in the 2000 appropriations rider has prospective applicability, *see* Pet. 29 n.9, but even if it does, this case is of great national significance because it involves the legal rights of the Government's 2,713,200 civilian employees—especially its 1,061,019 professional and administrative employees whose overtime pay depends exclusively on § 5542(a). *See* Pet. at 15 & n.4. Singing the opposite tune from its earlier position that this case has widespread consequences, *see* Pet. of the U.S. For Permission to Take an Interlocutory Appeal at 8, the Government now contends that "there is no reason to believe that the court of appeals' decisions . . . will have any practical impact outside of this case" because Petitioners' claims are "highly fact-specific" and "turn[] on the unique culture and practices of [DOJ]." Opp'n at 11–12. To the contrary, the Federal Circuit's ruling establishes the definitive standard for *all* future overtime claims under FEPA, and provides *all* federal agencies license to require their employees to work overtime, refuse to provide specific written authorizations for

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Pet. at 4, 15, and the denial of administratively uncontrollable overtime is intertwined with Petitioners' as-applied challenge.

[3] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 106-553, § 1 (a)(2), 114 Stat. 2762, 2762-A68 (2000).

such work, and thereby deny them overtime pay under the authority of 5 C.F.R. § 550.111(c) (2006).

Hard experience demonstrates that DOJ is far from the only federal agency willing to employ such tactics to cheat its employees out of overtime pay. There are scores of cases in which employees throughout the federal government won compensation for overtime work that their supervisors or agencies demanded of them without providing specific written authorization. *See, e.g.*, *Taylor v. United States*, 223 Ct. Cl. 655 (1980) (Army civilian security guards successfully sued for overtime pay for required overtime work for which he received no specific written authorization); *McQuown v. United States*, 199 Ct. Cl. 858 (1972) (same successful claim by ATF investigator).[4] This case offers this Court the opportunity to stop this nefarious practice before it spreads and to prevent a return to the era of governmental manipulation and exploitation of its employees that *Anderson v. United States*, 136 Ct. Cl. 365 (1956), and its progeny sought permanently to end.

The Government also contends that this case is unworthy of this Court's time because DOJ's attorneys—and, by the Government's reasoning, the other 2.7 million federal civilian employees—simply could have refused to perform required overtime work. The Government argues that "any adverse

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[4] *See also Hannon v. United States*, 29 Fed. Cl. 142 (1993) (denying Government's motion to dismiss overtime pay claims of DEA investigators required to work overtime without specific written authorization); *DeCosta v. United States*, 22 Cl. Ct. 165 (1990) (overtime pay awarded to Air Force firefighters required to work overtime without specific written authorization); *Fox v. United States*, 416 F. Supp. 593 (E.D. Va. 1976) (same for Deputy U.S. Marshalls); *Baylor v. United States*, 198 Ct. Cl. 331 (1972) (same for GSA security guards); *Bates v. United States*, 196 Ct. Cl. 362 (1971) (same for VA nursing assistants); *Rapp v. United States*, 167 Ct. Cl. 852 (1964) (same for duty officers for federal Civil Defense Administration); *Byrnes v. United States*, 163 Ct. Cl. 167 (1963) (same for ATF investigators).

personnel action [against such employee] *might well have been* invalid." Opp'n at 19 (emphasis added); *see also id.* at 8, 16 (*quoting Doe v. United States*, 372 F.3d 1347, 1364 (Fed. Cir. 2004) (*Doe II*) (A. 65a)). Tellingly, the Government is not willing to say without qualification that a federal employee may not be disciplined for refusing to work uncompensated mandatory overtime. More importantly, it defies credulity to imagine that federal employees can simply refuse required overtime work due to lack of specific written authorization. The Government cannot seriously contend that the Assistant United States Attorneys involved in the trials of Timothy McVeigh, Terry Nichols, the Unabomber, or Sheik Omar Abdel-Rahman (the first World Trade Center bomber), the Microsoft antitrust trial, the federal tobacco litigation, the Ruby Ridge or Waco standoffs or ensuing litigation, or other labor-intensive cases were free simply to "call it a day" at 5:00 P.M. or have their weekends to themselves, especially when high-level DOJ officials testified that overtime was necessary and approved. *Doe I*, 54 Fed. Cl. at 407; Pet. at 8. Had Petitioners or other federal employees done as the Government now recommends, the Government very well may have ground to a halt.

The Federal Circuit is the only court with jurisdiction to consider overtime claims against the Government. *See* 28 U.S.C. §§ 1295(a)(2), (a)(3) (2000). The Government does not dispute that, if this Court declines to grant *certiorari*, the Federal Circuit's rulings will be the judiciary's last word on this issue and will control the overtime rights of all 2.7 million federal civilian employees. *See* Pet. at 15–16. There will be nothing to stop any federal agency from meeting its budgetary goals on the backs of its rank-and-file employees by requiring them to work overtime while making it impossible for them to fulfill § 550.111(c)'s writing requirement and denying them overtime pay as a result.

II. The Government Has No Response to Petitioners' Argument that 5 C.F.R. § 550.111(c) Is Invalid as Applied.

The Government spends a good deal of its brief arguing that 5 C.F.R. § 550.111(c) is "entitled to deference," Opp'n at 12, "reasonably implements [5 U.S.C. § 5542(a)]," *id.* at 13, and is consistent with FEPA's legislative history, *id.* at 13–14. These arguments concerning § 550.111(c)'s facial validity ignore the main issue. Petitioners' first ground for seeking *certiorari* was that § 550.111(c) is invalid *as applied* to this case. *See* Pet. at 17–20 (*citing United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999)). Petitioners argued that, even assuming the Government *generally* may require employees to obtain prior written approval of overtime work under § 550.111(c), that requirement is invalid *as applied* in an agency in which employees regularly are required to work overtime but nevertheless are precluded from receiving specific written approval for it. In such cases, § 550.111(c) "is an unreasonable implementation of" the statutory language of § 5542(a) and "will not control." *Haggar Apparel*, 526 U.S. at 392. As a matter of law, if the Government chooses to condition a statutory right upon a regulatory requirement, it cannot make it impossible for a person to satisfy that requirement. The main case on which the Government and the Federal Circuit relied, *Schweiker v. Hansen*, 450 U.S. 785 (1981), is irrelevant because it concerns whether *valid* regulations must be enforced. That begs the question here, which is whether the regulation at issue was *valid as applied.*

The Government similarly ignores Petitioners' argument about the Antideficiency Act, 31 U.S.C. § 1342 (2000), which provides yet a further example of DOJ's nonsensical interpretation of § 550.111(c). If DOJ's implementation of § 550.111(c) is permitted to stand, top DOJ officials and supervisors throughout the nation repeatedly will have violated this *criminal statute* by accepting (indeed, requiring)

voluntary services from DOJ attorneys and essentially mandating that they waive part of their statutorily established salaries. Pet. at 19–20.[5]

The Government's discussion of FEPA's legislative history—its only apparent response to the as-applied challenge—turns the statute on its head. While DOJ ignores the primary purpose of the statute—to require overtime pay—even the legislative history the Government cites further demonstrates that DOJ's application and implementation of § 550.111(c) flouts Congress's intent. The Government concedes, "Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary constraints." Opp'n at 14–15. DOJ, however, refused to permit *any* agency official to "specifically authorize[]" its attorneys' required overtime work in writing, declined to implement *any* system for obtaining written approval of required overtime work, and refused to adopt *any* budget for payment of overtime to its attorneys. FEPA's legislative history provides no support for DOJ's unlawful refusal to pay overtime for mandatory work.

III. The Writ Should Be Granted Because the Federal Circuit Created a Circuit Conflict as to Whether the Government Ever Is Subject to Equitable Estoppel.

The Government also attempts to dissuade this Court from granting *certiorari* for Petitioners' second argument: that the Government should be equitably estopped from enforcing a regulation that it deliberately made impossible to satisfy. Opp'n at 17. The Government does not deny that the Federal Circuit imposed a blanket ban on equitable estoppel claims against the Government, no matter how egregious its actions,

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[5] Contrary to the Government's assertion, Petitioners raised the Anti-deficiency Act below, *see, e.g.*, Pl.'s Opp'n to Def.'s Mot. for Summ. J. & Pl.'s Cross-Mot. for Summ. J. at 72, and, in any event, it is not an independent claim subject to waiver.

or that the Federal Circuit's extreme position represents a departure from the law of nearly every other circuit.

Instead, the Government attempts to minimize the significance of the circuit split by claiming that, in many cases in which the regional circuit courts recognized that the Government could be equitably stopped, the court ultimately did not rule in favor of the plaintiff. Opp'n at 17. That is irrelevant to the existence of a circuit conflict because the Government does not and cannot dispute that virtually every regional circuit court has expressly recognized the viability of governmental estoppel. *See* Pet. at 21–24. Perhaps more importantly, the Government's argument is factually incorrect because numerous other circuits have equitably estopped the Government in a variety of cases, many involving federal funds or federal employment.

For example, in *Bunting v. Railroad Retirement Board*, No. 92-3879, 1993 U.S. App. LEXIS 24663 (6th Cir. Sept. 22, 1993), the agency awarded benefits to an injured worker, but held a lien against any proceeds he might receive in a personal injury lawsuit. The Board agreed to seek only $8,400 in reimbursement, but later attempted to recover additional funds from the worker. The Sixth Circuit equitably estopped the agency from doing so. *Id.* at *7. Similarly, in *Hondros v. United States Civil Service Commission*, 720 F.2d 278, 296 (3d Cir. 1983), federal regulations required a federal marshal to take a certification test to be promoted from a temporary to a permanent position. The Third Circuit held that the Civil Service Commission deliberately manipulated the timing of the test solely to prevent a worker from receiving the promotion and estopped the Commission from enforcing the regulation requiring the test. *See also Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 499, 501 (7th Cir. 1989) (where U.S. Attorney's Office agreed not to have certain funds escheat to the United States and later reneged, it was "a proper place to invoke an estoppel against the United States").

The Government claims that one of the cases Petitioners cited in which a court estopped the Government, *Winter v. United States*, 93 F. App'x 145 (9th Cir. 2004), is of little importance because it is "not binding precedent within the Ninth Circuit." Opp'n at 17. Even under the rule the Government cites, however, parties are permitted to rely on unpublished decisions like *Winter* "to demonstrate the existence of a conflict among opinions." 9th Cir. R. 36-3(c)(iii). *Winter* is yet another example of a federal circuit court equitably estopping the federal government based on its affirmative misconduct.

Other courts, though not entering final judgment for the plaintiff, have held that the plaintiff stated a valid estoppel claim and remanded for further factual findings. For example, in *United States v. Fitzgerald*, 938 F.2d 792, 794 (7th Cir. 1991), the Seventh Circuit held that the Small Business Administration ("SBA") could be estopped by an SBA representative's statement to guarantors on a federally backed loan that they "no longer had any obligation to the SBA on the loan guaranty." The court noted that the statement may have "risen above the level of mere negligence" and remanded to the district court to determine whether the SBA's acts qualified as affirmative misconduct. *Id.* at 797.[6]

The Federal Circuit's aberrational, absolutist holding that the federal government never can be estopped from enforcing a regulatory requirement, regardless of the extent of its deception or other misconduct, has created a definite circuit conflict on an important question of law that merits this Court's attention. That it is the Federal Circuit that is the outlier in this circuit split only exacerbates the need for *certiorari* because that court frequently is called upon to pass on the permissi-

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[6] *See also Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982); *In re Riverside Inv. P'ship*, 674 F.2d 634, 641 (7th Cir. 1982); *Semaan v. Mumford*, 335 F.2d 704, 706 (D.C. Cir. 1964); *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962).

bility of the Government's conduct, particularly toward federal workers.

IV. Alternatively, This Court Should Summarily Reverse and Remand Because the Federal Circuit's Appellate Fact-Finding and Refusal To Allow Petitioners To Raise New Arguments After Its Dramatic Change in the Law Contravened This Court's Precedents.

The Government maintains that reversal is unwarranted because the court of appeals engaged in appellate fact-finding only at Petitioners' invitation and that, despite all appearances to the contrary, "the court of appeals did not announce a new [legal] standard" governing this case. Opp'n at 17.

First, the Federal Circuit's refusal to allow Petitioners the opportunity to satisfy its new interpretation of § 550.111(c) on remand, and instead to make findings of fact on appeal concerning whether Petitioners' evidence satisfied the writing requirement, is flatly inconsistent with this Court's precedents. In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), a court of appeals announced a new legal standard governing an overtime class action lawsuit and applied that standard without remanding the case. This Court reversed on this ground alone, *id.* at 714, and its holding mandates reversal here. *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). The Government does not attempt to justify or defend this error on the merits, but instead twists the record to suggest that the Federal Circuit "reached that issue at petitioners' express invitation." Opp'n at 18. To the contrary, Petitioners never requested affirmance on this alternative ground. They merely noted—in response to the Government's argument to the Court of Federal Claims—that summary judgment could not be granted to the Government because questions of fact remained on this issue. Br. of the Pl.'s-Appellees at 34, *Doe II*.

Second, the Government's contention that the Federal Circuit did not create any new law is empirically false. In the years since *OPM v. Richmond*, 496 U.S. 414 (1990), the Court of Federal Claims consistently ruled that a federal employee must be paid under § 5542(a) for overtime work that was "officially ordered or approved," regardless of whether he received specific written authorization. *See, e.g.*, *Buckley v. United States*, 51 Fed. Cl. 174, 217 (2001); *Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *DeCosta v. United States*, 22 Cl. Ct. 165, 165–66 (Dec. 1990). Indeed, that court came to the same conclusion in the instant case and initially rendered judgment for Petitioners on liability. *See Doe I*, 54 Fed. Cl. at 418. Thus, the Federal Circuit's ruling in *Doe II*, which *expressly recognized* it was changing the law of the circuit, reversed over a half century of well-settled caselaw, *see* Pet. at 27 n.8, including numerous cases post-dating *Richmond* and *Schweiker*. Given this unexpected change in the governing law, this Court's precedents required the Federal Circuit to give Petitioners the opportunity to raise new, previously unnecessary claims.[7] *Cf. Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 66 (1966). Accordingly, this Court should vacate the Federal Circuit's rulings and instruct it to remand the case to the Court of Federal Claims to permit Petitioners to satisfy the new criteria and allow the trial court to make the necessary legal and factual findings.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioners respectfully request that this Court issue a writ of *certiorari*.

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[7] For example, Petitioners could have argued that DOJ should have included overtime as part of Petitioners' "regularly scheduled administrative workweeks" under 5 C.F.R. § 610.121(b)(3) (2006), which expressly creates a private right of action and does not contain a writing requirement.

Respectfully submitted,

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